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90-622

Supreme Court, U.S.
FILED
OCT 15
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
Supreme Court of the United States
October Term, 1990

THE STATE OF FLORIDA,

Petitioner,

vs.

LUZ PIEDAD JIMENO
and
ENIO JIMENO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

DOES THE SCOPE OF A CONSENT SEARCH EXTEND TO ALL AREAS, INCLUDING CLOSED CONTAINERS, WHICH COULD REASONABLY CONCEAL THE OBJECT OF THE SEARCH, WHEN THE CONSENTING INDIVIDUAL IS ADVISED AS TO THE NATURE OF THE INVESTIGATION AND THE OBJECT OF THE SEARCH.

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No. _____

IN THE
Supreme Court of the United States
October Term, 1990

THE STATE OF FLORIDA,
Petitioner,

vs.

LUZ PIEDAD JIMENO
and
ENIO JIMENO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at ___ So.2d ___, 15 F.L.W. S412, No. 75,057 (Fla. July 26, 1990). (Pet. App. 1a-3a).

The opinion of the District Court of Appeal of Florida, Third District is reported at 550 So.2d 1176 (Pet. App. 4a-6a).

The trial court's order granting motion of Respondents, Luz Piedad Jimeno and Enio Jimeno to, suppress evidence is not reported. (Pet. App. 7a-11a).

JURISDICTION

The Supreme Court of Florida's opinion was filed on July 26, 1990. This Court has jurisdiction. 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV, United States Constitution, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause ...

Amendment XIV, Section I, United States Constitution provides, in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law ...

Article I, Section 12, Florida Constitution, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

Respondents, Luz Piedad Jimeno and Enio Jimeno, were the Respondents in the Supreme Court of Florida. The facts of the case, as set forth in the trial court's order granting the motion to suppress, are as follows:

> On March 2, 1989, the Court heard the defendants' motions to suppress. None of the three defendants were present and counsel agreed to waive their presence.
>
> Based on the testimony of police officer, Frank Trujillo, the Court makes the following findings.
>
> 1. Officer Trujillo first observed the defendant, Enio Jimeno, making a telephone call at a pay phone and consulting his beeper. Because of the conversation he overheard, he became suspicious that Mr. Jimeno was involved in drug trafficking. The officer then followed defendants who went by car to an apartment complex, waited in their car, then drove around, returned to the complex, brought a package into an apartment, took it out and continued driving.
>
> 2. The officer followed the car and stopped Enio Jimeno for making a right turn at a red light without stopping. Luz Jimeno, Enio's wife, was

seated in the right front passenger seat and Cesar Tabares was in the back seat.

3. The traffic stop was valid and could have been made even if the officer had no suspicion of illegal drug trafficking.

4. After the stop, Enio Jimeno freely consented to the search of the vehicle he was driving, and advised the officer the car was jointly owned by himself and his wife, Luz. Luz, who was present when the search was conducted, did not object to the search.

5. Officer Trujillo found a closed brown paper bag on the floor of the car on the front passenger side. The bag was rolled up and it was not possible to see the contents without unfolding the bag.

6. Even though Officer Trujillo advised Enio Jimeno that the reason he wanted to search the vehicle was that he was looking for illegal drugs, and the defendant could have assumed that the officer would have searched the bag, the defendant did not specifically consent to the search of the bag and, i[n] (sic) fact, the officer never requested permission to open the bag and examine the contents.

(Pet. App. 7a-10a). The trial court in reliance on *State v. Wells,* 539 So.2d 464 (Fla. 1989), *aff'd. on other grounds,* 110 S.Ct. 1632 (1990), held that the scope of the consent given did not extend to the search and seizure of the bag. The trial court then granted the motion to suppress of Luz Piedad Jimeno and Enio Jimeno. (Pet. App. 10a).

The State appealed this decision to the District Court of Appeal of Florida, Third District. That court affirmed the trial court's suppression of the evidence. The court held that

a consent to a search of an area for narcotics does not extend the scope of the consent to a sealed container located within the general area consented to. This holding did not take into account that the container sought to be searched reasonably could have contained the object of the search. The Third District certified to the Florida Supreme Court of Florida, the question of whether the scope of consent extends to a closed container after consent has been given to search a motor vehicle for narcotics. (Pet. App. 4a-6a).

The Supreme Court of Florida accepted the State's petition for discretionary review based on the certified question. That court approved the decision of the district court. The Supreme Court concluded that consent to search the motor vehicle for narcotics was strictly limited to the passenger compartment of the motor vehicle. The scope of the consent did not extend to any containers located within the passenger compartment, regardless of whether the container reasonably could have contained the object of the search, to wit: narcotics. The Supreme Court based its holding herein on its alternative holding in *State v. Wells,* 539 So.2d 464 (Fla. 1989) *aff'd. on other grounds,* 110 S.Ct. 1632 (1990). (Pet. App. 16a-28a).

In *Wells,* the Supreme Court held that a general consent to open and look into the trunk of an automobile, without informing Wells what the police were looking for, was insufficient to authorize the opening of any locked or closed container found in the trunk. The court rejected the State's argument that, pursuant to *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2151, 72 L.Ed.2d 572 (1982), the scope of a consent search extends to every part of the vehicle and its contents that may conceal the object of the search.

> ... We cannot agree that the state and its agents, by receiving an ill-defined or limited consent to be searched, suddenly are vested with all the author-

> ity conferred by a warrant. Such a holding effectively would vitiate the entire theory upon which the consent search rests.

Wells, supra at 467 (Pet. App. 19a-21a).

The dissent found that the majority's interpretation of *Ross* was overly restrictive and erroneous. While acknowledging that *Ross* would not be authority to exceed the specific scope of a restricted search, the dissent reasoned that the *Ross* analysis is applicable to an unrestricted consent search. (Pet. App. 44a-46a).

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW THAT THE SCOPE OF A CONSENT SEARCH IS NARROWER THAN THE SCOPE OF A SEARCH AUTHORIZED BY A WARRANT CONFLICTS WITH DECISIONS OF THIS COURT, DECISIONS OF THE UNITED STATES COURTS OF APPEAL AND DECISIONS OF APPELLATE COURTS OF OTHER STATES.

After Enio Jimeno's vehicle was lawfully stopped, he freely and voluntarily consented to have his car searched for narcotics. Officer Trujillo found a rolled up brown paper bag on the floor of the front passenger side. Without requesting permission to open the bag, Officer Trujillo opened the bag and discovered cocaine. The trial court suppressed the cocaine finding that the scope of the consent did not extend to the brown paper bag. (Pet. App. 8a-10a). The Supreme Court of Florida affirmed the trial court's action. The court's affirmance was in accord with the holding in *State v. Wells,* 539 So.2d 464 (Fla. 1989), *aff'd on other grounds,* 110 S.Ct. 1632 (1990) that the scope of a consent search is narrower than the scope of a search based on a warrant or probable cause.

This holding, based on an erroneous interpretation of the scope of the consent search, resulted in an overly restrictive misapplication of the law to the facts herein. The proper interpretation of the scope of a consent search is that it is just as broad as a search based on warrant or probable cause.

This Court first recognized that the scope of a consent search is precisely the same as that of a search authorized by warrant in *Schneckloth v. Bustamonte,* 412 U.S. 218, 243, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). This principle was reaffirmed by this Court when it noted in *Walker v. United*

States, 447 U.S. 649, 657, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) that, "[w]hen an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization." An example of the principle followed:

> ... Consent to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers. ...

Id. at 657-658. These examples met the Fourth Amendment requirement that the scope of every authorized search be particularly described. *Id.* at 658.

The Supreme Court of Florida, on the other hand, could not understand the logic of equating the scope of a consent search with that of a search authorized by warrant. *State v. Wells, supra,* 539 So.2d at 467. An example of that court's logic is that, "the search of the trunk of a car would be permitted even if the defendant had said, 'You can look in my car, but not in my trunk!' " *Id.* at 467. This erroneous conclusion is based on the erroneous premise that the principles that apply to probable cause searches are totally inapplicable to consent searches. The court reasoned that a consent to search a vehicle containing luggage does not extend to the luggage, if the search of the vehicle itself does not reveal anything. This is so because probable cause does not exist from the search of the vehicle itself to allow the greater intrusion into the luggage. (Pet. App. 16a-21a).

The Supreme Court of Florida's premise is erroneous because a consent to search a particular area for a particular object, just as a warrant to search a particular area for a particular object, extends to all items located within the authorized area which might reasonably contain the object

of the search. In *United States v. Ross,* 456 U.S. 798, 820-822, 702 S.Ct. 2157, 72 L.Ed.2d 572 (1982) this Court succinctly stated this principle:

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand. (Footnotes omitted).

Thus, the Supreme Court of Florida's holding that the scope of a consent search is narrower than the scope of a search by a warrant is in direct conflict with precedent from this Court on this question.

The decision below also expressly conflicts with decisions of the United States Courts of Appeal on this issue. It also conflicts with decisions of appellate courts of other states.

In *United States v. Dichiarinte,* 445 F.2d 126 (7th Cir. 1971), the defendant consented to search his house for narcotics. During the search, the police opened desk drawers, inspecting and seizing personal papers. The court held that the consent to search for narcotics limited the police to searching only those areas which might reasonably contain narcotics. The court found that the scope of a consent search was no broader that a search conducted pursuant to a search warrant. Since a search warrant for narcotics would not have given the agents the power to read the defendant's documents, a consent search for narcotics was bound by the same scope:

> The Government complains that if we accept the defendant's argument, the limitations on officers' conduct under consent searches will be more stringent than under searches pursuant to a warrant. In our view, consent is a waiver of the right to demand that government agents obtain the authorization of a warrant to justify their search; and the need for a warrant is waived only to the extent granted by the defendant in his consent. A defendant's consent may limit the extent or scope of a warrantless search the same way that the specifications of a warrant limit a search pursuant to that warrant. Both limit the officers' activity by stipulating the areas into which they may look. Both may limit a search to certain areas or even to certain specified items within an area. *See United States v. Hopps,* 215 F.Supp. 734 (D.Md.1962), *aff'd.* 331 F.2d 332 (4th Cir.), *cert. denied,* 379 U.S. 820, 85 S.Ct. 39, 13 L.Ed.2d 31 (1964); *People v. Schmoll,* 383 Ill. 280, 48 N.E.2d 933 (1943). Thus if government agents obtain consent or a warrant to search for a stolen television set, they must limit their activity to that which is

> necessary to search for such an item; they may not rummage through private documents and personal papers.

Id. at 129-130 n.3.

In *United States v. Ware,* 890 F.2d 1008 (8th Cir. 1989), the defendant gave the police consent for a complete search of his apartment for narcotics. Using keys secured from defendant, the police opened the door to a locked storage door. Inside the storage area the police discovered cocaine. The court, relying on a search warrant case, which held that a warrant describing the apartment but not mentioning a storage area, was sufficient to allow the police to search the storage area since it was reasonable to suppose that the storage cabinet was appurtenant to the apartment:

> ... As for Ware's assertion that the scope of a consent search somehow is more restrictive than the scope of a warrant search, we point out the Supreme Court's statement that the standard is the same for both: "When an official search is properly authorized—*whether by consent or by the issuance of a valid warrant*—the scope of the search is limited by the terms of its authorization." *Walter,* 447 U.S. at 656, 100 S.Ct. at 2401 (emphasis in original).

Id. at 1011.

In *United States v. McBean,* 861 F.2d 1570 (11th Cir. 1988), the defendant was validly stopped for a traffic violation and thereafter consented to a search of the car. The search of the passenger compartment produced nothing. The trooper then opened the trunk of the car and found two pieces of luggage. A search of the luggage revealed marijuana. Although the case was decided on standing, the court citing *United States v. Dichiarinte, supra* at 129 n.3, held

that the scope of a consent search is defined by the scope of actual consent in the same way that the scope of a search based upon a search warrant is defined by the warrant. *See also United States v. Strickland,* 902 F.2d 937 (11th Cir. 1990).

In *United States v. Anderson,* 859 F.2d 1171 (3d Cir. 1988), the defendant's vehicle was lawfully stopped and the defendant signed a consent form which authorized removal of any property pertinent to a narcotics investigation. The police searched the trunk and discovered two bags which contained large sums of money. The court rejected the defendant's contention that scope of the consent was exceeded when the trunk was searched and the bags therein were located:

> ... Similarly, Officer Douglas, in searching the vehicle for evidence that the drug laws had been violated could not expect the contraband to be lying in plain view. As this circuit has said in the search warrant context: "Permission to search an automobile would be hollow indeed if it did not include permission to search its contents and component parts." *United States v. Milhollan,* 599 F.2d 518, 527 (3d Cir.), *cert. denied,* 444 U.S. 909, 100 S.Ct. 221, 62 L.Ed.2d 144 (1979).

Id. at 1176.

In *State v. Huether,* 453 N.W.2d 778 (N.D. 1990) the defendant was lawfully stopped and gave the police consent to search his motor vehicle for open containers of alcohol. During the search, the police observed two paper sacks; one clearly could contain alcoholic beverages and the other clearly could not. The police ignored the bag that could have contained the alcoholic beverages, opened the other one instead and discovered narcotics. The trial court suppressed the narcotics and was affirmed by the Supreme Court of

North Dakota. That court, applying the warrant standard to determine the scope of consent, found that the police only had authority to open bags which could reasonably contain the object of their search. Therefore, the court held that since the smaller bag could not possibly contain alcoholic beverages, the defendant's consent did not extend thereto. In support of its holding the court relied on *United States v. Ross, supra, United States v. Kapperman,* 764 F.2d 768 (11th Cir. 1985) (Applying the *Ross* analysis to consent searches) and *United States v. White,* 706 F.2d 806 (7th Cir. 1983) (same).

In *Gamble v. State,* 318 Md. 120, 567 A.2d 120 (1989), the defendant, a police officer, was advised that he was suspected of stealing money from a narcotics arrest. After being so advised, the defendant consented to a search of his automobile trunk. During the search a gym bag was opened and the missing money was discovered. The court, relying on *Ross,* held that the scope of consent extended to the gym bag since the object of the search, the money, could reasonably have been expected to be found in the gym bag.

As the foregoing decisions evidence, the appellate courts that have reached the question, have held that the scope of a consent search is as broad as a search authorized by a warrant. The reason is when an individual is informed as to the reason for the search, then the consent that is given extends to any item within the authorized area which could reasonably contain the object of the search. This is exactly what occurs in warrant situations, where a warrant to search a motor vehicle for narcotics extends to all containers found therein which could contain narcotics. This same standard applies in consent searches, especially where consent to search a motor vehicle is given only after the individual has been advised that the search is for narcotics and where the containers searched could contain narcotics. The instant decision, a radical departure from precedence, holds

that a consent search is narrower than one authorized by warrant and that consent is required for each item found during an authorized consent search, even when the item found could contain the object of the search. This rogue case has caused a schism in authority which will continue to widen without guidance from this Court, and therefore this case warrants consideration by this Court.

CONCLUSION

Based on the foregoing reasons, the Petitioner, **The State of Florida,** respectfully requests that this Court grant its Petition for a Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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No. _____

IN THE
Supreme Court of the United States
October Term, 1990

THE STATE OF FLORIDA,
Petitioner,
vs.
LUZ PIEDAD JIMENO
and
ENIO JIMENO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX

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Supreme Court of Florida

No. 75,057

STATE OF FLORIDA,

Petitioner,

vs.

LUZ PIEDAD JIMENO, et al.,

Respondents.

[July 26, 1990]

GRIMES, J.

We accepted jurisdiction[1] to review *State v. Jimeno,* 550 So.2d 1176 (Fla. 3d DCA 1989), wherein the district court of appeal certified as being of great public importance a question concerning the lawfulness of searching a closed container after consent has been given to search a motor vehicle for narcotics.

We agree with respondents that under *State v. Wells,* 539 So.2d 464 (Fla. 1989), *aff'd,* 110 S.Ct. 1632 (1990), the consent to search a vehicle does not extend to a closed container found inside the vehicle.

Therefore, we approve the decision of the district court of appeal.

It is so ordered.

SHAW, C.J., and OVERTON, EHRLICH, BARKETT and KOGAN, JJ., CONCUR
McDONALD, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

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1 Art. V, 3(b)(4), Fla. Const.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Third District - Case No. 89-888

(Dade County)

Robert A. Butterworth, Attorney General and Michael J. Neimand, Assistant Attorney General, Miami, Florida,

for Petitioner

Sidney Efronson and Ramon Tourgeman of the Law Offices of Sidney Efronson, Miami, Florida,

for Respondents

In The

District Court of Appeal of Florida Third District

July Term, A.D. 1989

THE STATE OF FLORIDA,
Appellant,

vs. CASE NO. 89-888

LUZ PIEDAD JIMENO and
ENIO JIMENO,
Appellees.

Opinion filed October 24, 1989.

An appeal from the Circuit Court for Dade County, Fredricka G. Smith, Judge.

Robert A. Butterworth, Attorney General, and Michael J. Neimand, Assistant Attorney General for appellant.

Sidney Efronson and Ramon Tourgeman and Calianne P. Lantz, for appellees.

Before BARKDULL, NESBITT, and JORGENSON, J.J.

PER CURIAM.

The state appeals from an order granting defendants' motion to suppress physical evidence. We affirm.

The question presented in this appeal is whether a concededly valid consent to search a motor vehicle for narcotics permits a search of a closed paper bag found on the front floor of the passenger side of that car. The trial court found that even though the officer advised defendants that he wanted to search the vehicle for illegal drugs, defendants

never specifically consented to a search of the rolled-up bag. Based on that finding, the trial court concluded that the scope of the consent given did not extend to the search and seizure of the bag.

This court has held that consent to a general search for narcotics does not extend to "sealed containers within the general area agreed to by the defendant." *Shelton v. State*, No. 87-1883 (Fla. 3d DCA Sept. 26, 1989). We decline to depart from the holding and rationale of *Shelton*;[1] we certify to the Florida supreme court the same question certified in *Shelton*.

Affirmed.

---

1 As in *Shelton*, here, viewing the totality of the circumstances, "the record is devoid of any facts which would have justified the opening of the sealed container at issue." *Id.*

In The Circuit Court Of The Eleventh Judicial Circuit In And For Dade County, Florida Criminal Division

Case No. 88-23967

THE STATE OF FLORIDA,
Plaintiff,

vs.
ENIO JIMENO, CESAR TABARES,LUZ JIMENO,
Defendants.

ORDER GRANTING MOTION TO SUPPRESS AS TO DEFENDANT, ENIO JIMENO, and DEFENDANT, LUZ JIMENO

ORDER DENYING MOTION TO SUPPRESS AS TO DEFENDANT, CESAR TABARES

On March 2, 1989, the Court heard defendant's motions to suppress. None of the three defendants was present and counsel agreed to waive their presence.

Based on the testimony of police officer, Frank Trujillo, the Court makes the following findings:

1. Officer Trujillo first observed the defendant, Enio Jimeno, making a telephone call at a pay phone and consulting his beeper. Because of the conversation he overheard, he became suspicious that Mr. Jimeno was involved in drug trafficking. The officer then followed defendants who went

by car to an apartment complex, waited in their car, they drove around, returned to the complex, brought a package into an apartment, took it out and continued driving.

2. The officer followed the car and stopped Enio Jimeno for making a right turn at a red light without stopping. Luz Jimeno, Enio's wife, was seated in the right front passenger seat and Cesar Tabares was in the back seat.

3. The traffic stop was valid and could have been made even if the officer had no suspicion of illegal drug trafficking.

4. After the stop, Enio Jimeno freely consented to the search of the vehicle he was driving, and advised the officer the car was jointly owned by himself and his wife, Luz. Luz, who was present when the search was conducted, did not object to the search.

5. Officer Trujillo found a closed brown paper bag on the floor of the car on the front passenger side. The bag was rolled up and it was not possible to see the contents without unfolding the bag.

6. Even though Officer Trujillo advised Enio Jimeno that the reason he wanted to search the vehicle was that he was looking for illegal drugs, and the defendant could have assumed that the officer would have searched the bag, the defendant did not specifically consent to the search of the bag and, if fact, the officer never requested permission to open the bag and examine the contents.

Based on these factual findings, the Court concludes that the scope of the consent given did not extend to the search and seizure of the bag.

Since there was no probable cause for the search, no exigent circumstances existed, and the contraband was not in plain view, the search was not legally permissible, see

State v. Wells, 13 F.L.W. 686 (Fla. Supreme Court Dec. 1, 1988), and the motion to suppress of Enio Jimeno and Luz Jimeno must be *granted*.

However, as to the defendant, Cesar Tabares, the passenger in the back seat, the motion is *denied* as he has no standing to object to the search.

DONE AND ORDERED in chambers at Miami, Dade County, Florida this 21 day of March, 1989.

/s/ Fredricka G. Smith
FREDRICKA G. SMITH
CIRCUIT COURT JUDGE

Copies furnished to:
Sidney Efronson, Esq.
Juan Vargas, Esq.

STATE OF FLORIDA,
Petitioner,

vs.

MARTIN LESLIE WELLS,
Respondent.

No. 69,363

Supreme Court of Florida

March 2, 1989

PER CURIAM.

On motion for rehearing by petitioner, we withdraw our prior opinion in this cause and substitute the following as the opinion of the Court.

We have for review *Wells v. State,* 492 So.2d 1375 (Fla. 5th DCA 1986), based on express and direct conflict with *State v. Wargin,* 418 So.2d 1261 (Fla. 4th DCA 1982). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We approve in part and quash in part the decision of the district court below.

While driving a car loaned by a friend, respondent was stopped by the highway patrol for speeding. The trooper noticed the smell of alcohol upon respondent's breath and arrested him for driving under the influence. At this time, respondent agreed to accompany the trooper to the station to take a breathalyzer test.[1] When respondent asked if he could retrieve a coat from the automobile, the trooper

1 A test later showed that respondent's blood alcohol content was below the legal limit. Wells v. State, 492 So.2d 1375, 1376 n.1 (Fla. 5th DCA 1986).

agreed, but accompanied respondent to the vehicle. At this point the trooper saw an amount of cash lying on the car's floorboard. 492 So.2d at 1375-76.

Suspicious of the cash's origin, the trooper asked respondent to open the trunk of the car. Respondent agreed, stating that he did not know what was in the trunk. However, neither respondent nor the trooper were able to manipulate a special locking mechanism that opened the trunk only when the key was pushed in and turned simultaneously. Giving up the effort, the trooper told respondent that the automobile must be impounded and received permission to force the trunk open if necessary and look inside. The trooper did not ask for or receive permission to look in the passenger compartment. *Id.* at 1376.

The car subsequently was transported to a facility under contract with the state, where a search was conducted. During this search, two marijuana cigarette butts were found in an ashtray. The trooper, assisted by others, opened the trunk with the key and found a locked suitcase inside. Under the direction of the trooper, employees of the facility attempted to pry open the suitcase with a knife. Some ten minutes later they succeeded, and found a garbage bag inside containing a large amount of marijuana. *Id.*

Respondent was charged with possession of a controlled substance. After his motion to suppress the contraband was denied at trial, respondent pled nolo contendere, but reserved his right to appeal on the suppression issue. The Fifth District later determined that the trial court had erred, and ordered the contraband suppressed. *Id.* at 1375, 1378. From this order, the state now seeks review.

The facts of this case raise three distinct questions of search and seizure law: the scope of the consent search conducted in this instance, the propriety of opening the-

locked container found during the automobile inventory search, and the propriety of the impoundment of respondent's vehicle.

The Consent Search

The state urges us to hold that respondent's general consent to open and look into the trunk of the automobile was sufficient to authorize the opening of any locked or closed containers found there. In support of this argument, the state contends that *Wargin* correctly extended the principles of *United States v. Ross,* 456 U.S. 798 (1982), to the consent-search context. We cannot agree.

Ross clearly stands for the proposition that, so long as probable cause exists to search an automobile, the police lawfully can search any container found inside. Thus, the *Ross* Court upheld the search of an automobile after the police received a tip from a reliable informant that drugs were being sold from the vehicle, stopped it and found a paper bag and a zippered pouch containing contraband and a large amount of cash. 456 U.S. at 800-01. Based on these facts, *Ross* held: "If *probable cause* justifies the search of a lawfully stopped *vehicle,* it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 825 (emphasis added).

There was no issue of a consent search in *Ross.* Indeed, the principles that apply to probable cause searches are totally incongruous to the freedom of choice inherent in consent. As *State v. Fuksman,* 468 So.2d 1067 (Fla. 3d DCA 1985), and the district court below recognized:

> The considerations upon which the holding in *Ross* is grounded do not exist in the consent search context where there is no probable cause. If a person consents to the search of a vehicle containing luggage and a search of the *vehicle alone* reveals nothing, the problem of the possible greater intrusion by detention or seizure does not arise because the probable cause necessary to secure the warrant is nonexistent. Therefore, the officer has no dilemma because he has no choice; he must let the consenting party be on his way. It is because the citizen has not given the police probable cause to believe his vehicle contains contraband that he has the right to proceed without official interference. Absent probable cause, the police can engage in the greater intrusion of searching the luggage only under circumstances in which the scope of the consent to search is defined clearly enough to include the luggage.

Fuksman, 468 So.2d at 1070. A consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. *Id.* On the other hand, a probable cause search and its scope are compelled, no matter what might be the wish of the individual. A theory based on consent and one based upon state-sponsored coercion thus are incompatible, and fusing them could lead to absurd results. Under such logic, the search of the trunk of a car would be permitted even if the defendant had said, "You can look in my car but *not* in my trunk."

Thus, we decline to apply *Ross* to consent searches, and, to the extent it conflicts with our opinion today, we disapprove *Wargin.* We cannot agree that the state and its agents, by receiving an ill-defined or limited consent to be searched, suddenly are vested with all the authority conferred by a warrant. Such a holding effectively would vitiate the entire theory upon which the consent search rests.

We also concur with the district court's conclusion that the consent given in this instance did not permit the police to pry open locked luggage with a knife. Respondent's permission merely indicated that the police could look into the automobile trunk. This was an insufficient basis for the police action that followed.

In so holding, we decline to establish a rule that effectively would countenance breaking open a locked or sealed container solely because the police have permission to be in the place where that container is located, as in this instance. This would render the very act of locking or sealing the container meaningless and would utterly ignore a crucial concern underlying fourth amendment jurisprudence: the expectation of privacy reasonably manifested by an individual in his locked luggage, no matter where that luggage is located.[2]

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2 *Ross* itself reached this conclusion when it explicitly distinguished United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979). *See* United States v. Ross, 456 U.S. 798, 811-15 (1982). *Chadwick* had drawn a clear distinction between automobiles, which have a "diminished expectation of privacy," 433 U.S. at 12, and luggage which has "expectations of privacy ... substantially greater than in an automobile." *Id.* at 13. *Sanders* had suggested that a warrant was required to open a suitcase where "it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband." 442 U.S. at 767 (Burger, C.J., concurring in the judgment). *Ross* reaffirmed this holding, although it rejected some of *Sanders'* analysis. 456 U.S. at 824. If this conclusion applies when the police actually have probable cause to search luggage, it certainly applies when they do not.

As stated in *Chadwick:*

> Once the federal agents had seized it ... there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained. ... With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.

When the police are relying upon consent to conduct a warrantless search, they have no more authority than that reasonably conferred by the terms of the consent. If that consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to do so unless the search can be justified on some other basis. Our own courts generally have agreed on this principle. *State v. Carney,* 423 So.2d 511 (Fla. 3d DCA 1982) (permission to go aboard boat did not give consent to open hidden compartments and containers therein); *Loftis v. State,* 391 So.2d 219 (Fla. 1st DCA 1980) (defendant's cooperation in opening truck did not give agricultural inspector consent to remove and open taped package), *review denied,* 399 So.2d 1146 (Fla. 1981); *Major v. State,* 389 So.2d 1203 (Fla. 3d DCA 1980) (no consent where defendant opened tote bag for airport officer to look in, but where officer spontaneously reached in and grabbed a nasal inhaler containing contraband), *review denied,* 408 So.2d 1095 (Fla. 1981); *Luxenburg v. State,* 384 So.2d 742 (Fla. 1st DCA 1980) (opening vehicle to agricultural inspector did not authorize him to slit open bag with knife); *Moorehead v. State,* 378 So.2d 123 (Fla. 2d DCA 1980) (consent for officer to look at pool cue did not authorize unscrewing of cue to see what was rattling inside); *Villari v. State,* 372 So.2d 522 (Fla. 1st DCA 1979) (no consent when defendant allowed access to vehicle but asked "Don't you need a warrant" when officers approached containers and luggage); *Ross v. State,* 369 So.2d 447 (Fla. 1st DCA 1979) (no consent when defendant allowed officers to look in camper but apparently denied access to containers); *Raleigh v. State,* 365 So.2d 1048 (Fla. 4th DCA 1978) (no

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433 U.S. at 12. Moreover, *Chadwick* expressly noted that the search of the footlocker was a far greater intrusion into interests protected by the fourth amendment than was the mere seizure of the footlocker. *Id.* at 14 n.8.

consent where occupants acquiesced to warrantless search of vehicle's trunk where officer opened trunk himself without asking permission).

In the present case, the arresting officer plainly stated he had no actual consent to open the suitcase found in the automobile trunk.[3] We thus must agree with the court below that the general consent to look in an automobile trunk in this case did not constitute permission to pry open a locked piece of luggage found inside.[4] *Wells*, 492 So.2d at 1378. The very act of locking such a container constitutes a manifest denial of consent to open it, readily discernible by all the world. It creates a legally recognized zone of privacy inside

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3 The following colloquy with the arresting officer occurred:

Q: Did [Wells] give you permission to go into the trunk of that car?

A. Oh, yes, no problem, but he said — I said: "Do you mind if I look in your trunk," and he said, "Sure go right ahead."

. . . .

Q: Now, since [Wells] had indicated to you that he did not know what was in the trunk, you clearly did not extend the questioning to say: "Well, whatever I find in the trunk, is it okay if I look in that, too?

A. No, I didn't.

4 We acknowledge that this case raises an issue as to whether respondent had standing to assert a privacy interest in the luggage itself, since he apparently contended the luggage was not his. *See* United States v. Salvucci, 448 U.S. 83 (1980) (receding from the "automatic standing" doctrine). We find, however, that the state effectively has waived this argument by failing to raise it below, or in this appeal. *See* Steagald v. United States, 451 U.S. 204, 209 (1981). Moreover, respondent unquestionably does have a protected privacy interest in the borrowed car he was driving, which confers standing to challenge both the impoundment and inventory search conducted in this instance. *See* United States v. Posey, 663 F.2d 37 (7th Cir.), *cert. denied*, 455 U.S. 959 (1982); State v. Warren, 59 N.C. App. 264, 296 S.E.2d 671 (1982), *aff'd in pertinent part*, 309 N.C. 224, 306 S.E. 2d 446 (1983); People v. Robinson, 121 Misc.2d 267, 467 N.Y.S.2d 552 (Westchester County Ct. 1983); People v. Zimmerman, 117 Misc.2d 121, 458 N.Y.S.2d 468 (Sup. Ct. 1982).

that container, *Arkansas v. Sanders*, 442 U.S. 753, 765-66 (1979), that is protected under the United States Constitution and Florida's privacy amendment from the kind of governmental intrusion without probable cause that occurred in this case. *See* Art. I, § 23, Fla. Const.

As to the marijuana cigarette butts found in the ashtray, we conclude that their seizure is not sustainable under a consent theory, since the trooper neither asked for nor received permission to search the passenger compartment.

The Inventory Search

We must also reject the state's contention that the seizure of the luggage was independently permissible under an inventory search theory. In *Colorado v. Bertine*, 107 S.Ct. 738 (1987), the United States Supreme Court delineated the requirements for opening sealed containers during a proper inventory search. *Bertine* stated:

> We emphasize that, in this case, the trial court found that the police department's procedures *mandated the opening of closed containers and the listing of their contents.* Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.

Id. at 742 n.6 (emphasis added; citations omitted). As Justice Blackmun noted in his special concurring opinion, joined by two other justices:[5]

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5 These three justices also concurred in the majority opinion, and specifically cited footnoe 6 as a reason for so doing. 107 S.Ct. at 744. As a ground upon which a majority of the Court agreed, the "no discretion" requirement constitutes a clear holding of the *Bertine* court.

> The underlying rationale for allowing an inventory exception to the Fourth Amendment warrant rule is that police officers are not vested with discretion to determine the scope of the inventory search. This absence of discretion ensured that inventory searches will not be used as a purposeful and general means of discovering evidence of crime. Thus, it is permissible for police officers to open closed containers in an inventory search *only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle.*

Id. at 744 (Blackmun, Powell & O'Connor, JJ., concurring) (emphasis added; citation omitted).

The impermissible discretion to open or not to open containers is evident in this case. Contrary to *Bertine's* holding, the Florida Highway Patrol ("Patrol"), at least upon this record, operates under no mandatory standardized policy regarding closed containers. Unlike in *Bertine,* this record is devoid of any trial-court finding "that the police department's standard procedures did mandate the opening of closed containers and the listing of their contents." *Id.* Joining this action as *amicus curiae,* the Patrol itself has submitted copies of relevant portions of its Policy Manual, which fail to address the question. Chapter 16 of the Policy Manual, governing the receipt of property and vehicles, speaks in general terms and requires nothing more than an "[i]nventory of all articles in the vehicle ... such as articles of clothing, equipment and tools." Policy Manual, at 16-4. There is no mention of opening closed containers.

In the absence of a policy specifically requiring the opening of closed containers found during a legitimate inventory search, *Bertine* prohibits us from countenancing the procedure followed in this instance. The police under *Bertine*

must mandate either that all containers will be opened during an inventory search, or that no containers will be opened. There can be no room for discretion. Since this record reveals no such mandatory policy, we must hold that the opening of the luggage in this instance violated Bertine.

The Impoundment Issue

Finally, we find that the impoundment in this instance, and hence the search of the interior of the car that followed was proper under *Bertine.* This conclusion is compelled by the fact that, to the extent of any inconsistency, *Bertine* has superseded *Miller v. State,* 403 So.2d 1307 (Fla. 1981), and *Sanders v. State,* 403 So.2d 973 (Fla. 1981). Under the analysis in *Bertine,* we believe the Patrol is not compelled to provide an alternative to impoundment, as we held in *Miller* and *Sanders.* Thus, we believe the officer in this instance acted reasonably by choosing to impound an automobile containing several thousands dollars in cash rather than leave it unprotected at the roadside.

For this reason, we conclude that the seizure of the marijuana cigarette butts in this instance was permissible as an incident of a proper impoundment. *See* Art. I, § 12, Fla. Const. Since the cigarette butts were not inside any closed or locked container, the suppression of the butts was improper under *Bertine.*

We thus, approve in part and quash in part the result reached by the district court below, and remand for proceedings consistent with this opinion. No renewed motion for rehearing will be entertained.

It is ordered.

ENRLICH, C.J., and BARKETT, GRIMES and KOGAN, J.J., Concur

SHAW, J., Dissents with an opinion, in which OVERTON and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

SHAW, J., dissenting.

Article I, section 12 of the Florida Constitution provides that rights granted therein involving searches and seizures will be construed in conformity with the fourth amendment to the United States Constitution, as interpreted by the United States Supreme Court. Thus, the issue of impoundment and inventory search is controlled by *South Dakota v. Opperman,* 428 U.S. 364 (1976), and its progeny. I agree with the majority that *Colorado v. Bertine,* 479 U.S. 367 (1987), has overruled *Miller v. State,* 403 So.2d 1307 (Fla. 1981), and *Sanders v. State,* 403 So.2d 973 (Fla. 1981), that the police are not required to provide an alternative to impoundment, and that the marijuana cigarette butts found in the car's ashtray are admissible. For the reasons which follow, I do not agree that *Bertine* mandates exclusion of the eighteen pounds of marijuana found locked in the suitcase.

Wells was stopped for speeding on a rural road between Palatka and St. Augustine in the evening hours. He alighted from his car and produced an expired driver's license and a car title in another's name. After the officer detected alcohol on his breath, Wells failed a roadside sobriety test and was arrested for driving under the influence. Wells asked, however, to retrieve a coat from the car. While doing so, the officer saw a large sum of cash lying on the floorboard in front of the driver's seat. Wells gave conflicting explanations of this money and it was impounded and inventoried. The arresting officer asked Wells to open the car trunk and Wells agreed, saying he did not know what was inside, but neither the officer nor Wells could open the trunk. Wells agreed that the trunk could be forcibly opened, if necessary, after towing.

The car was left with a backup officer and later towed. The arresting officer transported Wells to the local police station for a breathalyzer test and proceeded to the storage area to inventory the car. The arresting officer found two marijuana cigarette butts in the car's ashtray. The tow operator then opened the trunk where a locked suitcase was found. The suitcase was forced open and eighteen pounds of marijuana in a trash bag was seized.

The majority holds that the police acted properly in impounding the car. However, relying primarily on *Bertine,* the majority holds that the eighteen pounds of marijuana should be excluded because Florida Highway Patrol standardized procedures do not specifically mandate that locked containers found in impounded cars be opened and inventoried. Although the FHP can easily remedy this perceived deficiency in their operating instructions, I am persuaded that the current instructions effectively mandate the opening and inventorying of such closed containers when a vehicle is impounded and that these instructions are indistinguishable from those in *Bertine.*

The inventorying of the contents of impounded cars is based on three distinct needs: to protect the owner's property; to protect the police against claims over lost or stolen property; and to protect the police from potential dangers, such as explosives. *Opperman,* 428 U.S. at 369. The Florida Highway Patrol, Forms and Procedures Manual, section 16.00.00, provides:

> In the course of duty on a day to day basis, it is necessary for the protection of the Trooper and the Department to inventory vehicles being towed and/or stored. Vehicles which are towed as a result of an accident, abandoned, seized, incident to an arrest, or otherwise detained in storage, and not in the possession of the owner *become the respon-*

> ***sibility of the impounding officer. The officer is liable for the vehicle, its part and contents.*** Therefore, for the protection of the officer and the Department, the following forms and instructions have been developed for the Trooper to inventory and make a record of vehicle and private property on an inventory sheet that will also serve as a receipt with (1) a copy for the Department, (2) a copy for the towing company, (3) a copy of release, (4) a copy for the impounding officer, and (5) a copy for the owner/or driver. The same amount of copies of the Property Receipt with the same designation will be provided.

(Emphasis supplied.) Chapter 16.01.00 of the manual provides that inventory forms will be used any time a vehicle is towed and/or stored. Chapter 16.02.00 instructs officers, inter alia: "Lost Property in Vehicle—Inventory of *all articles* in the vehicle should be shown such as articles of clothing, equipment and tools." (Emphasis supplied.) The companion form contains columns labelled "Item," "Quantity," and "Description of Property Obtained."

In my view, these instructions make clear that an inventory is required for all impounded cars and that the inventory will be comprehensive and detailed, extending down to articles, not merely containers, closed or otherwise. This reading of the instructions is consistent with the testimony of the officer who conducted the arrest and inventory. According to this officer, he consulted with his backup officer and supervisor, and, as in the case of previous arrests, the inventory was performed according to procedures he was supposed to follow. This understanding of the standard instructions by the persons to whom they are addressed is also consistent with the three purposes of the inventory set

forth in *Opperman* and reiterated in *Bertine,* none of which would be adequately served if closed containers were not opened and inventoried when vehicles are impounded.

The majority's conclusion that here, unlike *Bertine,* the police operating instructions do not mandate the opening of closed containers is contrary to the facts of *Bertine* as we have them. Neither Chief Justice Rehnquist's opinion for the Court nor Justice Blackmun's concurring opinion actually quotes the police operating instructions which the Court found mandated opening closed containers for inventory. These instructions were, however, quoted by Justice Marshall in dissent where he argued that no standardized criteria limited the police officer's discretion. The operative words are "the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM." *Bertine,* 479 U.S. at 380 n.4. These instructions require a "detailed" inventory but they are certainly no more explicit or definitive than the Patrol instructions quoted above which make the impounding officer responsible for the vehicle, its parts and contents, and require completion of an inventory form listing all articles, such as articles of clothing, equipment, and tools. Chief Justice Rehnquist, for the Court, responded to Justice Marshall's criticism by finding that the instructions not only circumscribed the discretion of individual officers, they also protected the vehicle and its contents and minimized claims of property loss. *Bertine,* 479 U.S. at 376 n.7. The standard Patrol instructions here are even more specific than those which the *Bertine* concurring opinion found "mandate[d] the opening of closed containers and the listing of their contents." 479 U.S. at 377 (Blackmun, J., concurring). In my view *Bertine* stands for the proposition that when a legitimate impoundment is made and standard police instructions mandate that an inventory be conducted, contraband discovered is constitutionally admissible.

The majority also distinguishes *United States v. Ross,* 456 U.S. 798 (1982), holding that *Ross* addresses probable cause searches only and is not relevant to consent searches. However, in cases cited by petitioner and not distinguished by the majority, federal courts have found Ross relevant to the scope of a consent search. *United States v. Kapperman,* 764 F.2d 786, 794 (11th Cir. 1985); *United States v. White,* 706 F.2d 806, 808 (7th Cir. 1983). Moreover, on the authority of *Bertine, Ross* is relevant to inventory searches.

> "When a legitimate search is underway, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." *United States v. Ross, supra,* 456 U.S. at 821, 102 S.Ct. at 2170.
>
> We reaffirm these principles here: " '[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interest involved in the specific circumstances they confront.' " See *Lafayette, supra,* 462 U.S. at 648, 103 S.Ct. at 2610 (quoting *New York v. Belton,* 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981).

Bertine, 479 U.S. at 375. The broad application of these quoted words and the fact that the *Bertine* Court chose to affirm their application to a non-probable cause, inventory search strongly suggests that the Supreme Court does not take the narrow view of *Ross* which the majority adopts here. While *Ross* would not be authority to exceed the

specific scope of a restricted consent, as the majority points out, it would appear to be applicable to an unrestricted consent search, or an inventory search, such as here.

In summary, the majority has misapplied *Bertine* which, in my view, is factually and legally indistinguishable from the case at hand. I would quash the decision below and reinstate the conviction.

OVERTON and McDONALD, J.J., Concur

Application for Review of the Decision of the District Court of Appeal - District Conflict of Decisions

Fifth District - Case No. 85-1630

(Putnam County)

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